

104 FERC ¶ 61,298  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

Midwest Independent Transmission  
System Operator, Inc.

Docket No. ER03-574-001

ORDER DENYING REHEARING

(Issued September 16, 2003)

1. In this order the Commission denies Consumers Energy Company's (Consumers) and Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) joint request for rehearing of the order issued on May 22, 2003 (May 22 Order).<sup>1</sup> This order protects customers from paying costs not properly recovered from such customers.

**Background**

2. On April 25, 2002, the Commission issued an order which stated its intent to allow recovery of all costs prudently incurred by any member of the now defunct Alliance Regional Transmission Organization (Alliance RTO) to establish an RTO once that company is a member of an RTO.<sup>2</sup>

3. On February 27, 2003, Midwest ISO filed a request for authorization to reimburse Consumers approximately \$8.3 million, under Schedule 10 of the Midwest ISO Open Access Transmission Tariff, for costs Consumers claimed to have incurred in seeking to establish the Alliance RTO.

4. The May 22 Order denied Midwest ISO's request for authorization. The Commission recognized its previously-stated intention to allow recovery of all costs prudently incurred by an Alliance RTO member to establish an RTO once it is a member of an RTO. However, it found that Consumers had already been adequately

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<sup>1</sup>Midwest Independent Transmission System Operator, Inc., 103 FERC ¶ 61,219 (2003).

<sup>2</sup>Alliance Companies, et al., 99 FERC ¶ 61,105 at 61,442 (2002) (April 25 Order). The Commission initially expressed its intention to consider proposals for recovery of Alliance RTO-related prudently incurred costs in Alliance Companies, et al., 97 FERC ¶ 61,327 (2001).

compensated. The Commission explained that Consumers had transferred its transmission facilities to its affiliate Michigan Electric Transmission Company (METC) and received authorization for the further sale and transfer from METC to Michigan Electric Transmission Company, LLC (Michigan Transco), whose transmission facilities are under the operational control of the Midwest ISO, prior to the issuance of the April 25 Order.

5. In addition, the May 22 Order explained that Consumers closed on the deal to sell METC to Michigan Transco on May 1, 2002, after the April 25 Order was issued and that Consumers did not seek clarification of that order.

6. In any event, the May 22 Order found that Consumers was not entitled to recover costs associated with Alliance RTO development activities because it did not join an RTO as a transmission owner; it had already sold its transmission facilities to Michigan Transco.

### **Request for Rehearing**

7. On June 23, 2003, Consumers and Midwest ISO filed a joint request for rehearing. They request the Commission to clarify that the May 22 Order intended to allow all prudently incurred Consumer Alliance RTO start-up costs to be recovered by the current owner of Consumers' former transmission system, i.e. Michigan Transco, because it is a member of the Midwest ISO.

8. In the alternative, Consumers asserts that the Commission erred in denying the Midwest ISO's request for authorization to reimburse Consumers for its Alliance RTO start-up costs.<sup>3</sup> Consumers argues that it has not been compensated for its prudently incurred costs related to its participation in the Alliance RTO development and that Michigan Transco did not agree to compensate Consumers for Alliance RTO start-up costs as part of the purchase price for Consumers' assets. Further, Consumers points out that the purchase agreement between Consumers and Michigan Transco contained language allowing Consumers to recover "[a]ny start-up cost reimbursements from Alliance made to the Buyer or [Michigan] Transco for the Seller's or [Michigan] Transco's expenses incurred prior to the Closing Date . . . ."<sup>4</sup>

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<sup>3</sup> We note that Midwest ISO takes no position on Consumers' argument.

<sup>4</sup> Membership Interest Purchase Agreement, Section 5.10, Regional Transmission Organization (filed November 13, 2001 in Docket Nos. EC02-23-000 and ER02-320-000).

9. In addition, Consumers argues that it had no obligation or opportunity to seek clarification of the April 25 Order prior to the completion of the sale of its transmission system and that it has properly documented its incurred Alliance RTO start-up costs.

### **Discussion**

10. We will deny Consumers' and Midwest ISO's request for rehearing. The threshold issue before us is whether Consumers is entitled to recover costs it may have incurred in the development of the Alliance RTO. As we stated in the May 22 Order, the April 25 Order indicates that a proposal to recover costs associated with Alliance RTO development activities should be part of a participant's proposal when it places transmission facilities in an RTO. Consumers did not join an RTO as a transmission owner; it had already sold its transmission facilities to Michigan Transco.<sup>5</sup>

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<sup>5</sup> As we noted in the May 22 Order, Consumers no longer has transmission facilities, but rather is just a transmission customer. Although the April 25 Order explained the Commission's intention to allow recovery of all costs prudently incurred by an Alliance company "to establish an RTO once it is a member of an RTO," 99 FERC ¶ 61,105 at 61,442, it is apparent from the language and context of the order that the Commission was specifically referring to the recovery of costs by transmission owning companies who join an RTO and not "customer members" of an RTO. The original Alliance companies, including Consumers at that time, were all transmission owning companies, see Alliance Companies, 89 FERC ¶ 61,298 at 61,914 & n.1 (1999), order on reh'g, 91 FERC ¶ 61,152 (2000); accord 99 FERC ¶ 61,105 at 61,429 & n.1, 61,440-42 (Alliance companies whose petition in Docket No. EL02-65-000 the Commission was addressing were transmission owning companies), and when we indicated in December 2001 that we would consider proposals for recovery of Alliance RTO-related prudently incurred costs, see 97 FERC ¶ 61,327 at 62,531, the companies before us were transmission owning companies (at that point in time, Consumers' transmission facilities were with its wholly-owned subsidiary METC, see 103 FERC ¶ 61,219 at P 2, and METC was one of the filing companies, see 97 FERC ¶ 61,327 at 62,524; accord Alliance Companies, et al., 96 FERC ¶ 61,052 at 61,130 n.4 (2001)). See id. at 62,524. With respect to Consumers' recovery of its Alliance RTO-related costs, Consumers and METC did not join in the later filing by the transmission owning Alliance companies in Docket No. EL02-65-000, in response to which the Commission indicated that it would be receptive to recovery of Alliance RTO-related prudently incurred costs. Compare 99 FERC ¶ 61,105 at 61,429 n.1 with 99 FERC ¶ 61,105 at 61,440-42.

Finally, when Consumers sought authorization to transfer its jurisdictional transmission facilities to METC, and when a protestor in response argued that Consumers might earn a profit from an eventual sale to a third party and therefore asked for a credit  
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11. Furthermore, Consumers' arguments that it has not been adequately compensated and that Michigan Transco did not agree to include Alliance RTO start-up costs as part of the purchase price are to no avail. Consumers transferred its transmission facilities first to METC and then ultimately to Michigan Transco,<sup>6</sup> and closed on the deal that ultimately sold its transmission facilities to Michigan Transco after the April 25 Order was issued. Moreover, the Commission had initially expressed its intent to consider proposals for recovery of Alliance RTO-related prudently incurred costs in December 2001.<sup>7</sup> Consumers thus had adequate opportunities and time to recover prudently-incurred Alliance RTO-related costs.<sup>8</sup> Any compensation that Consumers believes that it

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in rates of any such profit, see 94 FERC ¶ 61,018 at 61,033, Consumers responded in opposition that it would no longer have jurisdictional transmission rates and therefore the Commission should not require a credit. See id. at 61,034. Yet here, when, as Consumers anticipated, it no longer has jurisdictional transmission facilities and no longer has jurisdictional transmission rates, Consumers would not only not have to credit back to ratepayers any profit, but seeks to recover from ratepayers Alliance RTO-related, i.e., transmission-related, costs.

<sup>6</sup> 103 FERC ¶ 61,219 at P 2, 17-18.

<sup>7</sup> Id. at P 4 & n.8.

<sup>8</sup> The Commission does not in any way concede that the amounts paid to Consumers in these transactions did not adequately compensate Consumers for its Alliance RTO-related costs.

Consumers, for example, in the transfer to its affiliate METC (which was, for the purposes of the relevant earlier order, then known as Michigan Transco), apparently anticipating eventual profits, objected to a request by a protestor for a condition that any "profits Consumers might realize in any sale of [METC]" be credited to its ratepayers, and the Commission, in fact, did not impose any such condition. See Consumers Energy Company, 94 FERC ¶ 61,018 at 61,033, 61,034 (2001). And the subsequent transfer to Michigan Transco was made at a purchase price equal to the stockholders' equity plus \$44 million (subject to certain adjustments). Trans-Elect, Inc., 90 FERC ¶ 61,142 at 61,416, order on reh'g, 98 FERC ¶ 61,368 (2002).

I.e., the transfer to Michigan Transco would yield to Consumers approximately \$50 million in excess of depreciated (i.e., net book) value. Compare 98 FERC at 61,417 (purchase price of second, Michigan Transco, transaction authorized in February 2002 is approximately \$295 million) with 94 FERC at 61,033 (purchase price of first, METC, (continued...))

missed out on simply amounts to a missed opportunity and fails to provide a sufficient basis to allow Consumers to now recover such costs.

The Commission orders:

Consumers' and Midwest ISO's request for rehearing is hereby denied.

By the Commission.

( S E A L )

Magalie R. Salas.  
Secretary,

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transaction authorized in January 2001 is approximately \$247 million); accord 98 FERC at 61,423-24 and 98 FERC at 62,590-91 (noting that Michigan Transco sought rate recovery for acquisition premium to compensate Consumers for tax consequences).